CONCLUSION

As the petition presents no question which merits this Honorable Court's review upon a writ of certiorari, the Respondent respectfully submits that this petition for a writ of certiorari should be denied.

Respectfully submitted,

THOMAS E. FOX,
Deputy Attorney General,
State of Tennessee,

APPENDIX

C. RAYUS COOLEY,
Assistant Attorney General,
State of Tennessee

EXHIBIT A.

In the Court of Criminal Appeals of Tennessee,
Middle Section at Nashville.

Leo Crumley,
Plaintiff in Error,
v.
State of Tennessee,
Defendant in Error.

Marion
Criminal.

On Petition to Rehear.

The State has filed a petition to rehear our previous action in reversing these two cases because the record shows both that the cases were tried without a jury and by a jury.

The petition calls to our atfention that the bill of exceptions shows affirmatively that the cases were tried by a jury, although the minute entries reflect that the defendant waived a jury trial and also that the trial court heard a motion to set aside the jury verdict. The State relies on the rule that as between the minute entry and a bill of exceptions the bill of exceptions controls.

In **Percer v. State**, 118 Tenn. 765, 103 S. W. 780, the minutes showed the defendant's presence when the verdict was rendered, but the bill of exceptions showed affirmatively that he was not in the courtroom but in the prisoner's room at that time. The court held that the recital in the minutes did not preclude the prisoner from showing the truth that he was not in the presence of the court

on the return of the verdict. The bill of exceptions controlled over the minute entry in that case.

In **Helton v. State**, 195 Tenn. 36, 255 S. W. 2d 694, the minute entry and bill of exceptions conflicted as to whether the defendant excepted to the discharge of a juror. The Supreme Court held that the bill of exceptions controls under these circumstances.

Church v. State, 206 Tenn. 336, 355, 333 S. W. 2d 799, held that in a conflict between the minute entry and the bill of exceptions as to the exact verdict returned by a jury, the bill of exceptions controls.

Since the bill of exceptions here clearly shows that a jury heard the cases, we think the conflict in the record should be resolved by application of the rule that the bill of exceptions prevails over the minute entries when they are in conflict. We are, therefore, constrained to grant the petition to rehear, set aside the judgment heretofore entered and determine the cases on their merits. This court on appeal may correct the erroneous judgments in these cases. See **Cowan v. State**, 117 Tenn. 247, 96 S. W. 973; **Coleman v. State**, 121 Tenn. 1, 113 S. W. 1045.

The defendant below, Leo Crumley, was jointly indicted with one Robert Cross in three cases—burglary in the third degree, attempt to commit burglary, and carrying burglarious instruments. The cases came on for trial in Marion County on July 5, 1967. Cross was not present and the court granted a severance as to him. The defendant requested that all three cases be tried together. The panel of jurors present was not sufficient to select a jury to try all three cases, and the State entered an order nolle prosequi as to the attempt to commit burglary case. The other cases were tried together and resulted in verdicts of guilty, with three years in each case. In accordance with the verdicts, the court sentenced the de-

fendant to three years for burglary in the third degree and one to three years for carrying burglarious instruments.

The State's proof showed that about 11:30 P. M. on February 20, 1967, the defendant and two others broke open the door to the office of Jeff Payne's Coal Yard in South Pittsburg. The defendant was carrying a tire tool used to force open the door; Cross had a sledge hammer and the third person a shotgun.

A special officer, Lee Beene, saw them and notified another officer, William Bynum, who shot twice. Bynum apprehended Cross and the defendant was arrested about twenty minutes later hiding in a culvert under the railroad tracks. He was wearing gloves. He claimed he had been shot, but this was incorrect. The third person escaped and was never apprehended. The defendant did not testify.

The sole assignment of error is that the trial court erred in permitting the witness Lee Beene to remain in the courtroom during the testimony of the witness William Bynum in violation of the rule of exclusion of witnesses.

After the selection of the jury, the witnesses were sworn and placed under the rule. Beene was prosecutor in the case of carrying burglarious instruments; Jeff Payne was prosecutor in the charge of burglary in the third degree.

Payne had completed his testimony and Officer Bynum on direct examination had testified about the breaking and his arrest of the defendant. At this time the assistant district attorney general called to the court's attention that Officer Beene had just entered the courtroom and asked the court if he were subject to the rule of sequestration of witnesses. The court held, over defendant's ob-

jection, that since Beene was prosecutor in one of the cases being tried he could remain in the courtroom.

In **Smartt v. State**, 112 Tenn. 539, 551, 80 S. W. 586, the court held that it was not error to permit the prosecutor to remain in the courtroom after the rule had been called for, but the trial court should require him to testify first. The court further held that, since it could not see that any substantial injury was done by requiring the prosecutor to testify first, there was no reversible error.

The settled rule in this state is that the matter of placing witnesses under the rule or exempting them is in the discretion of the trial judge and his action will not be reversed unless it is made to appear that he abused his discretion to the prejudice of the defendant. **Nance v. State**, 210 Tenn. 328, 358 S. W. 2d 327.

Upon consideration of the entire record, we are satisfied that the defendant has received a fair trial and that there was no prejudice to him by the prosecutor remaining in the courtroom. This assignment is overruled and the judgment of the lower court is affirmed.

Judge Galbreath did not participate in this case.

/s/ Mark A. Walker,
Mark A. Walker,
Presiding Judge.

Concur:

W. Wayne Oliver.

Office of Clerk of the Court of Criminal Appeals
For the Middle Division of the State of Tennessee.

I, Ramsey Leathers, Clerk of said Court, do hereby certify that the foregoing is a true, perfect, and complete copy of the Opinion on Petition to Rehear of said Court,

pronounced at its February term, 1969, in case of Leo Crumley against State of Tennessee as appears of record now on file in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the Court at office in the Supreme Court Building at Nashville, on this, the 3rd day of September, 1969.

(Seal) Ramsey Leathers, Clerk,

By ....., Deputy Clerk.